No. 2592

United States

Circuit Court of Appeals

For the Ninth Circuit

BEN GUIDONI,

Appellant,

vs.

J. H. WHEELER, City Jailer
of the town of Juneau, Alaska,

Appellee

Brief for Appellee

Upon Appeal from the United States District Court for the District of Alaska, Division No. 1

J. A. HELLENTHAL &
SIMON HELLENTHAL,
Attorneys for Appellee

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STATEMENT OF THE CASE

This is an appeal from an order made by the District Court for the First Division of the District of Alaska, at Juneau, in which the court refuses to release the appellant upon a Writ of Habeas Corpus. The appellant had been tried and convicted for violating an ordinance of the town of Juneau by the municipal magistrate of said town after a hearing had. The appellee contends that said conviction was in all respects lawful:

1. That the Magistrate's court is legally organized and existing.

2. That the Town of Juneau was empowered and authorized to enact ordinance in question.

3. That the jurisdiction of the magistrate's court over misdemeanors made so by ordinance is concurrent with jurisidiction District court and Commissioner's court in cases also covered by general laws.

4. That the ordinance is a reasonable police regulation considering the conditions prevailing in the Town of Juneau.

ARGUMENT

1. MAGISTRATE'S COURT LEGALLY ORGANIZED AND EXISTING.

The magistrate's court of the city of Juneau derives its authority and jurisdiction from acts of Congress passed March 3, 1899, 30 Stat. L. 1253; June 6, 1900, 31 Stat. L. 1438; March 3, 1901, 11 Supplemental R. S., Chap. 859, page 1806; March 2, 1903, 32 Stat. L., Chap. 978, page 944; April 28, 1904, 33 Stat. L., Chap. 1778, page 529. To better understand the force and effect of this legislation we will briefly refer to the procedure under which misdemeanors were prosecuted prior to their enactment. Prior to March 3, 1899, the general laws of Oregon, as they were in force and effect in that state, were adopted as the laws of Alaska as far as they were applicable, Act of May 17, 1884, Section 7, R. S., 1 Supple., Chap. 53, page 430, also in 23 L. S. 24. The laws of Oregon at the time they were adopted by Alaska contained a criminal code and a code of criminal procedure under which misdemeanors were tried, but did not refer to the procedure to be followed in the municipal courts, as cities were incorporated in Oregon, and given their powers by special acts of congress.

The act of March 3, 1899, was a compilation of the laws of Oregon as far as they pertained to crimes and criminal procedure. The enacting clause of which reads: "Be it enacted that the penal and criminal laws of the United States of America and the procedure thereunder relating to the district of Alaska shall be as follows": This act defines crimes, provides the punishment therefor and provides for a code of criminal procedure under which felonies and misdemeanors are to be tried in the District of Alaska and gives the District courts, and Justice courts with some limitations, jurisdiction to try misdemeanors.

By the Act of June 6, 1900, the civil laws of the state of Oregon and some parts of the civil laws of the state of Montana and the civil procedure of the state of Oregon with slight modification were adopted and made the civil code and the code of civil procedure for the District of Alaska, which enactment is referred to as the Alaska Civil Code and Code of Civil Procedure. Part of this act, chapter 21, provides for the incorporation of towns, the election of a common council. Section 201 gives the town council certain general powers, among which are the right to appoint and the pleasure to remove clerk, treasurer, and assessor and such other officers as they may deem necessary and by ordinance to provide for protection of the public health, police protection, and the expense of assessment and collection of taxes. It does not expressly refer to or establish a municipal court, nor does it expressly provide for the election or ap-

pointment of a municipal magistrate. This chapter however was amended on March 3, 1901, which amendment refers to the duties of the treasurer, the matter of the expending and proportioning the license money, and was again amended by the Act of March 2, 1903, Section 5 of which act provides that the common council may by ordinance declare what shall be a misdemeanor, provide for ———, ———, protection of public health, police protection, etc. Section 11 provides that the common council may by ordinance provide reasonable punishment for the violation of municipal ordinances. Section 12 provides for the election of a municipal magistrate, who shall have power to hear and determine causes arising under the ordinances of such corporation and to punish violations of all such ordinances. It does not provide a procedure under which the magistrate court should proceed in the trial of misdemeanors, but we contend that such provision would be entirely superfluous since congress had previously enacted a code of procedure under which all misdemeanors were to be tried in the District of Alaska.

The city of Juneau was incorporated under the law of June 6, 1900, and established a municipal court on the 10th day of July, 1903, and on April 28, 1904, congress again amended Chapter 21, which act purports to amend and codify the laws relating to municipal corporations in the District of Alaska and repeals all acts and parts of acts inconsistent therewith to the extent of such inconsistency. This act, as far

as it relates to the municipal magistrate, makes him an appointive officer instead of an elective officer, Section 4, Second Sub. Section, and provides that a municipal magistrate shall have jurisdiction of all actions for violation of municipal ordniances, Section 4, Tenth Sub. Section, and we contend that the latter act does not in any way curtail or affect the powers of the municipal magistrate as previously given him, but substantially re-enacts those powers. By the Act of 1903, the common councils were empowered to define misdemeanors and to provide for police protection.

By the act of 1904, in Section 4, Sub. 6, thereof they are again empowered to provide for police protection and by the 10th sub-section to prohibit drunkenness, gambling houses or places of ill fame, disorderly conduct, or conduct endangering the public peace, public health and public safety, to define such offenses and to prescribe the punishment thereof.

We contend that the powers given by the Act of 1903 to declare what shall be a misdemeanor and to provide for police protection are as broad as the powers given by the Act of 1904, in which the council is authorized to punish disorderly conduct, conduct endangering the public peace, public health or public safety and to define such offenses. And further contend that the common council had the power to enact the ordinance in question, being Ordinance No. 27, passed and approved July 27, 1903, under the law

passed March 2, 1903, and that the Act of 1904 did not in any way invalidate said ordinance as the powers of the common council as far as they relate to police regulations are similar in the two acts.

The Colorado case cited by appellant is not applicable since there were many constitutional restrictions in the state of Colorado which prevent courts being organized unless certain specific rights were conferred which were not conferred by Section 2714 of the general laws of Colorado, which provide for the election of a police judge and stopped there. They, however, tried to bring it under a previous act, Section 9 of Act of February 18, 1874, but said act provided that a justice of the peace might be elected as municipal magistrate, thus limiting the eligible candidates to justices of the peace, and since the officer in the case was not a justice of the peace he could not possibly hold under said act. We contend that at the time the acts of congress were passed authorizing the organization of the municipal courts by municipal corporations in Alaska there was a well established procedure in the District of Alaska under which misdemeanors were tried and that the acts of congress passed are amply sufficient to authorize the organization of municipal courts thereunder.

We further contend that it is not absolutely essential to the validity of the organization and jurisdiction of a municipal court that a code of procedure should be laid down by the legislature, and that in the absence of such procedure the municipal council

can enact a code of procedure in harmony with the laws of the state or territory and in accord with the spirit of our institutions, and that a conviction had under a procedure so established would not be disturbed upon a proceeding in habeas corpus, unless the procedure was shown to be in conflict with the laws of the state or territory, or in contravention of the spirit of our institutions. *Ex. parte Mauch*, 66 *Pac.* 734.

2. THE TOWN OF JUNEAU WAS EMPOWERED AND AUTHORIZED TO ENACT ORDINANCE IN QUESTION.

We have already set up the acts and powers given municipal corporations in Alaska by the legislature, and contend that the city of Juneau was authorized to enact said ordinance under the law of 1903 and that the law of 1904 did not change or modify the powers of the common council, as far as the ordinance under consideration is concerned; that the police powers given municipal corporations by the two acts are the same and for this reason we do not think it is important to consider whether the Act of 1904 repealed the Act of 1903 in regard to the police powers conferred. We, however, contend that it did not repeal the provisions of the former act that are not inconsitent with the latter act, and that the Act of 1904 repealed only inconsistent parts of the Act of 1903. The authorities cited by appellant are to the

effect that the intention of the legislature should govern; the heading of the act, which purports to amend and codify, would seem to indicate that the legislature meant to cover the whole subject of municipal corporations by the act, but the act itself clearly shows the intention of the legislature, and repeals only such parts of prior acts as are inconsistent therewith.

3. JURISDICTION MAGISTRATE COURT MISDEMEANORS CONCURRENT WITH JURISDICTION DISTRICT COURT AND COMMISSIONER'S COURT.

We contend that the jurisdiction of the magistrate's court in Alaska over misdemeanors made such by ordinance of the municipality to prohibit drunkenness, gambling houses or places of ill fame, disorderly conduct or conduct endangering the public peace, public health or public safety, is concurrent with the jurisdiction of the district courts and commissioners' courts, if the acts upon which a conviction is sought also constitute a misdemeanor under the general laws of the Territory, and if not covered by general laws, then the jurisdiction of municipal court is exclusive, and contend that the enactment of Section 2 of Ordinance 27 of the city of Juneau comes within the powers expressly granted by the 10th sub-division of Section 4 of the Act of 1904, which gives the common councils express power to prohibit drunkenness,

gambling houses or places of ill fame, disorderly conduct or conduct endangering the public peace, public health or public safety, and to define such offenses.

We are at a loss to say what congress would mean by "disorderly conduct or conduct endangering the public peace or safety" if it did not mean precisely the matters covered by said ordinance. It is true that according to said ordinance the people therein enumerated are to be deemed vagrants, but the matters specified in said ordinance also constitute disorderly conduct, conduct endangering the public peace and public safety. If the matters and facts therein prohibited are disorderly acts, or acts endangering the public peace and public safety then congress gave municipal corporations in Alaska the power to prohibit such acts by ordinance, regardless of whether the same acts also constitute a violation of the general laws of the Territory. In this connection it is important to consider the character of the acts prohibited, whether they are to be regarded as an offense against the state or territory primarily or whether they are to be regarded as an offense particularly against the municipality. In considering the concurrent jurisdiction of municipalities and state, not only the express powers granted the municipality become important, but the character of the offense is of great importance. Drunkenness has been held to be an offense particularly against the municipality, which affects especially the morals of the local community, and ordinances de-

nouncing it have been sustained under a general grant of power although the same acts constitute an offense against the state by statute. *McRae* vs. *Americas*, 59 Ga., 168-170; *Blumfield* vs. *Trimble*, 54 Iowa, 399, 6 N. W. 586. In the McRae case, while upholding an ordinance prohibiting drunkenness under a general grant of power in a state where drunkenness was an offense against the state, the court says: "Municipal government stands between the family and the state. It is an aid to both and partakes of the nature of both. Police ordinances are at once family rules on a large scale and state laws on a small scale. * * * * Many transactions that are made penal by the general laws of the state, may, at the same time, afford material for a proper police ordinance. The state may deal only with the central elements of a transaction which is fringed all around with adjuncts that ought to be prohibited by ordinance as highly mischevious to the quiet of municipal society." Likewise the keeping of a house of ill fame has been characterized as an offense particularly municipal, *Greenwood* vs. *State*, 6 Baxter (65 Tenn.) 567, and the same acts may be made an offense against the state and an offense against the municipal corporation; that an act made penal under the statutes of the state or territory may be further penalized under municipal ordinance.

The cases in regard to the power necessary in order to impose such additional penalties are somewhat in conflict, but the later decisions consider not only the

direct power granted, but give great consideration to the matters covered by the ordinance, if the matters are peculiarly municipal and affect especially the morals of the local community. The best considered cases and especially the more recent ones have not hesitated to uphold the municipal ordinance in regard to police regulations under general grant of power. *See Vol* 3, *McQuillin on Municipal Corporations, Chap.* 25, *and particularly Sec.* 941 *and Sec.* 975; *Taylor vs Sanderson*, 118 *Ga.*, 63; 43 *S. E.* 845.

Double regulations have been sustained in a majority of the states, including Oregon; *Wong vs Astoria*, 13 *Ore.*, 538; 11 *Pac.*, 295; *State vs. Sly*, 4 *Ore.*, 277; *State vs. Bergman*, 6 *Ore.*, 341; and by the courts of the United States, *Moore vs. Illinois*, 14 *Howard* 13; *Cross vs. North Carolina*, 132 *U. S.*, 131; 10 *Sup. C.*, 47. There are many acts constituting offenses which may be made offenses against the municipality although they are governed by state or territorial laws and among them are the conducting of houses of ill fame, lewd women on the streets, public drunkenness, gambling, disturbing the peace, nuisances, careless driving and vagrancy, which has been held to be such an offense in *St. Louis vs. Bents*, 11 *Mo.* 61; *Kansas City vs. Neil*, 49 *Mo. App.*, 72-78. In St. Louis vs. Bents, John Bents was proceeded against before the recorder of the City of St. Louis under the provisions of an ordinance of the city entitled "an ordinance respecting vagrancy." Upon the trial he was found guilty and fined $75.00, from

where he appealed to the criminal court and there moved to dismiss the proceeding and quash the charge against him for the reason that the city ordinance under which he was convicted was void, the city having no power by its charter to pass such ordinance. His motion was sustained by the criminal court and the city accepted and appealed. The court in deciding the case says:

> "By the 38th subdivision of the 2nd section of the 3rd article of the charter of the city of St. Louis, the city council are vested with power 'to regulate the police of the city.' Although this is a very vague and indefinite grant of power, yet it must have been intended to confer other powers than those specifically granted, otherwise there existed no propriety in the enactment. When, therefore, it can be seen that the exercise of any jurisdiction by the corporation can be clearly brought within the scope of this grant without a violation of the constitution or a conflict with the laws of the state, there can be no objection to its exercise. We think this case is one of that character * * * * It is true, that by the general law of the state, an individual found to be a vagrant under the provisions of the statute, may be proceeded against before a justice of the peace, but this does not forbid the corporation making a local regulation on the same subject—a subject affecting the well-being and prosperity of the community to as great an

extent as almost any other within the control of the corporation. The judgment of the criminal court is therefore reversed, and the cause remanded."

4. THAT THE ORDINANCE IS A REASONABLE POLICE REGULATION.

In considering the reasonableness of this ordinance it is important to look at the wording of the ordinance having in mind the meaning given these words from time out of mind, as well as the conditions existing in the city of Juneau sought to be remedied, which matters are fully covered by the opinion of the lower court in this cause. If we are right in our contention that the common council had express power to pass the ordinance in question the reasonableness of the ordinance will not be questioned by the courts. *McQuillan on Municipal Corporations, Sec.* 724, *and cases cited.* Some cases hold that the power of a court to declare an ordinance unreasonable and therefore void is restricted to cases in which the legislature has given no express power on the subject of the ordinance and consequently to cases in which the ordinance was passed under the supposed incidental powers and does not extend to a case where there is either specific or general power to enact th ordinance. *Coal Fleet vs. Jeffersonville* 112 *Ind.*, 15 *and* 19; 13 *N. E.*, 115. The reasonableness of ordinances is not to be tested by its application to extreme cases. *Com-*

monwealth vs. Palstied 148 *Mass.*, 375; 382; 19 *N. E.* 224;*Commonwealth vs. Cutter*, 156 *Mass.*, 52, 56; 29 *N. E.*, 1146.

Further, that an ordinance, general in scope, may be adjudged reasonable and valid as applied to one set of facts and unreasonable and invalid as applied to facts of different character. Thus there is a distinction between an attack made upon an ordinance by way of appeal and in habeas corpus proceedings, as an ordinance must be reasonable as applied to the particular subject matter, *Willow Springs vs Withoupt*, 61 *Mo. App.*, 275; *People vs. Armstrong*, 73 *Mich.*, 288; 41 *N. W.*, 275. And that judicial authority to declare an ordinance unreasonable is a power to be cautiously exercised. *Commonwealth vs. Robertson*, 5 *Cushing*, *Mass.*, 438. The general rule is that municipal corporations are prima facie the sole judges respecting the necessity and reasonableness of their ordinances and that there is a legal presumption in their favor; that in questions of doubt the courts are inclined to refer to the discretion and judgment of the municipal authorities. Courts hold: "When municipal authorities have adopted an ordinance, before a court is justified in holding the same to be invalid the unreasonableness or want of necessity of such a measure for the public safety and for the protection of life and property must be clearly made to appear. It should be manifest that the discretion interposed by the municipal authorities has been abused." *McQuillan on Municipal Corporations, Sec.*

731, *and cases cited,* and also later cases, which hold that an ordinance regularly passed under the police powers of the municipality, will be presumed to be reasonable and the conditions warranting the passage of said ordinance will be presumed to exist unless the contrary is shown.

Wells vs. Town of Mt. Olivet, 102 S. W., 1182;
Miller vs. City of Birmingham, 44 So. 388;
Jersey City Railway Company vs. Jersey City, 67 Atl., 1072;
City of Seattle vs. Hurst, 97 Pac., 454;
Cincinnati vs. Burkhardt, 30 Ohio Cir. Ct. R., 350;
Harter vs. Barkley, 112 Pac., 556;
St. Louis Gunning Advertising Co., vs. City., 137 S. W., 929;
Ex parte Savage, 141 S. W., 244;
Commonwalth vs. Price, 94 S. W., 32;
Mayor of Taladega vs. Fitzpatrick, 32 So., 252;
Lawson vs. Connally, 141 N. W., 625;
Chicago vs. Mandel Brothers, 106 N. E., 180;
City of Brenhan vs. Holle & Sulhurst, 153 S. W., 345;
Rochester vs. McCaulay F. M. Co., 92 N. E., 641, and
Dillon on Municipal Corporations, 5th Edition, paragraph 599.

In *Harter vs. Barkley,* cited above, the court adopts

the language of Re Zhizhuzza, 147 Cal., 334; 81 Pac. 955, and says:

" 'A municipal ordinance must be very clearly obnoxious to such objection before it will be declared invalid. Every intendment is to be indulged in favor of its validity, and all doubts resolved in a way to uphold the law-making power; and a contrary conclusion will never be reached upon light consideration. It is the province and right of the municipality to regulate its local affairs—within the law, of course—and it is the duty of the courts to uphold such regulations, except it manifestly appear that the ordinance or by-law transcends the power of the municipality, and contravenes rights secured to the citizens by the constitution, or laws made in pursuance thereof.' Ex parte Haskell, 112 Cal., 416, 44 Pac., 725; Ex Parte McKenna, 126 Cal., 432, 58 Pac., 916; Ex Parte Lemon, 143 Cal., 563, 77 Pac. 455.' In the majority opinion in that case, signed by six of the justices, the following language is adopted with approval from the case of California Reduction Co. v. Sanitary Reduction Works, 126 Fed., 29, 61 C. C. A., 91: "Laws or ordinances enacted under the police power for the protection of the public health, reasonably adapted to that end, are not unconstitutional, because they may incidentally operate to deprive individuals of their property or its use without compensation, or interfere with

their personal liberty, nor because they may give one person a monopoly of a certain business or occupation; private rights being required to yield in such case to the public good."

In *Mayor of Talladega vs. Fitzpatrick, super*, it is held that the enactment of an ordinance by the common council is prima facie evidence of its reasonableness and the fact that the offense is defined the same under the general law with the exception that the word "wilful" is not contained in the ordinance does not in any way invalidate the same for the reason that in construing the ordinance the courts will not convict unless it is shown that the act was done wilfully.

In *Lawson vs. Connally, super*, the court says: "Courts cannot interfere with legislative discretion and are slow to declare ordinances invalid because unreasonable. When the power to legislate upon the subject has been conferred upon the common council, the council's discretion and not the court's must control, in such matters the city authorities are usually better judges than the courts."

In the case of *Jersey City Street Railroad Company vs. City of Jersey, super*, in regard to the presumption of the reasonableness of ordinances, the court says: "The sole contention is that the ordinance is unreasonable because it is impossible to comply with it. It being conceded that its subject matter is within the police power of the municipality and that the board of street and water commissioners is the proper leg-

islative body to exercise that power, the presumption is (until the contrary be shown) that the ordinance is reasonable. The question of reasonableness is a question of fact and the burden of proof is upon those who attack the ordinance to show its unreasonableness. The courts will not interfere unless it is clearly shown that the ordinance, either upon the face of its provisions or by reason of its operation in the circumstances under which it is to effect, is unreasonable and oppressive."

In *City of Seattle vs. Hurst, super*, the court say:

"An ordinance to be void for unreasonableness must be plainly and clearly unreasonable, there must be evidence of weight that it took inception either in the mistake or in a spirit of fraud or wantonness on the part of the enacting body."

Commonwealth vs. Price, super, is a case decided by the Court of Appeals for the State of Kentucky, and involves the construction of an ordinance of the city of Madisonville, and was decided after the case of Gastenau vs. Commonwealth, 108 Ky., 473, 56 S. W., 705, which case is cited by the appellant and depended upon to a large extent for a reversal here. In regard to the reasonableness of the ordinance, the court say: "The city council has a large discretion in the enactment of ordinances and an ordinance enacted under the police power will not be declared void unless it is clearly oppressive and unreasonable." The ordinance construed in the above cited case was an amendment or an ordinance similar to the one con-

strued in the Gastenau case, except that the ordinance under consideration makes it an offense for the saloon keeper to suffer an infant or female to drink in his saloon, or to be or remain there over five minutes, and provides that when these facts are shown, the prosecution has made out its case and the burden then shifts to the defendant to show that he is an infant or female in good repute and was at the time sober and orderly and had the consent of the parent or guardian of the infant or husband of the female, or, that it was a case of reasonable necessity. The court say: "It is a well known fact that the frequenting of saloons by lewd women tends to immorality and that the frequenting of saloons by infants is not promotive of good citizenship."

Apply this rule of construction to the case at bar in which there was no evidence taken tending to show the unreasonableness of the ordinance, the District Court has found the conditions prevailing in the city of Juneau, as shown by the opinion herein, and has found in favor of the ordinance. The municipal council being the primary judges as to the reasonableness of an ordinance and the burden being placed upon the person attacking an ordinance to show that it is unreasonable, nothing having been offered to show the unreasonableness of the ordinance, we contend that the ordinance should not be held unreasonable.

The appellant in his brief lays great stress upon the Michigan case, In the Matter of Frazee, 63 Mich.,

369, which arose in the city of Grand Rapids and was a conviction under an ordinance regulating street parades in said city and provided that it should be unlawful to parade the streets without first obtaining the consent of the mayor, which consent under the ordinance could be arbitrarily exercised by the mayor and the granting or refusing of which depended upon the mayor's unregulated official discretion, and the chief objection against the ordinance and at least the main reason for the decision of the court in the Frazee case was that it gave arbitrary powers to the mayor of the city. This case was followed by Pinkerton vs. Verberg, 78 Mich., 573, which case involved an unlawful arrest made in the city of Kalamazoo, the facts of which are not applicable to the case at bar. The reason laid down in this Michigan case, Pinkerton vs. Verberg, seems to have been adopted by the court in St. Louis vs. Glover, 109 S. W., 30, which case was an appeal from a decision of a lower court under an ordinance somewhat similar to the one in the case at bar, in which the facts showed that the appellant was engaged in peaceful picketing at the time of the arrest. We submit that the Michigan cases, as well as the case based upon the decision in the Michigan cases, lose much of their force and effect since the later decision of the Michigan court *In re Stegenga*, 94 *N. W.*, 384, which was an appeal from the refusal to grant a Writ of Habeas Corpus to the petitioner who was accused and convicted of having been found loitering about in common bar

rooms and wandering about the streets by day and by night without any lawful means of support and without being able to give a satisfactory account of himself in the city of Grand Rapids, for a period of two weeks, under an ordinance which made it unlawful for persons to loiter about any hotel, block, common bar room, dram shop, gambling house or disorderly house, or wander about the streets either by night or day without any lawful means of support and without being able to give a satisfactory account of himself or herself, in which case it was contended that the ordinance was void, first because of lack of authority of the city council and second because it was unreasonable and that it interfered with the constitutional rights of personal liberty. The court, after reviewing the prior Michigan cases, including the case of Pinkerton vs. Verberg and In re Frazee, says:

> "But it is not certain that this man was not a disorderly person, punishable at common law. For two weeks he loitered about the streets and barrooms, in idleness, without apparent habitation, and without any means of support, according to the charge. Yet he lived, and the inference is not unreasonable that he was supported in idleness by others in some way. He loitered about barrooms, (i. e., tippling places), and gave no satisfactory explanation of his conduct. Blackstone says (4 Bl. Com., 169) that all idle persons are punishable, while the statute, 17

Geo. 11, e., 5, provided that idlers and disorderly persons, rogues, and vagabonds, and incorrigible rogues should be punishable; idlers and disorderly persons by a month's imprisonment, and the other classes by more severe penalties. And, if it be said that this statute is no part of our common law, idle persons were punishable under ancient statutes, which in their turn merely declared the common law in that respect. See 4 Bl. Com., 169. The uniformity of the practice of authorizing and passing and enforcing ordinances for the punishment of mendicants, idlers, and vagabonds is a circumstance that indicates the general recognition that such persons may be treated as lawbreakers, and punished in accordance with the general law of the land.

"But little need be said on the other branch of the case, for the foregoing discussion shows that it is not an invasion of constitutional right to punish conduct in fact disorderly, and dangerous to and destructive of good order.

"It does not follow that this ordinance would justify the conviction of all arrested under it, or that each of its provisions, standing by itself, would constitute an offense. We do not say that they would, or would not. In this case, however, we are satisfied that the acts charged, and of which, the petitioner was convicted, constitute an offense under this ordinance, and the petition will be dismissed, and the petitioner remanded

to the custody of the respondent. The other justices concurred."

The appellant cites numerous cases under the heading, "Fundamental Errors of the Lower Court," and contends that the court erred in laying down the rule previously discussed, that prima facie a police ordinance regularly enacted is reasonable and that courts will not find the same unreasonable unless its unreasonableness is made to appear. And wish here to call attention to the difference between police regulations regularly enacted for the purpose of regulating matters that are purely municipal and under the police power, or ordinances which involve bond issues and the construction to be placed upon a bond given by the city thereon as in the case of Thomas vs. City of Grand Junction, 56 Pac., 665; or an ordinance involving the power of the city to contract and the construction of its contract made, State vs. Butler, 77 S. W., 560; or in the case of an ordinance under which a tax deed was issued by the city, in which it was held that the authority given to issue a tax deed did not give implied power to warrant, Meday vs. Borrough of Rutherford, 48 A., 529; or an ordinance which regulates water rates and impairs the obligation of a contract as in Los Angeles Water Company vs. City of Los Angeles, 88 Fed., 720; or ordinances under which the city attempts to regulate under its police powers a business carried on beyond the corporate limits of the city, City of Elkhart vs. Lipschitz, 74 N. W., 528; or the cases involving the construction

of an election ordinance and the right of certain applicants for a writ of mandamus compelling the auditor to issue warrants for salaries, as in the case of Kirkham vs. Russell, 76 Va., 976; or in a case involving the granting of franchises where the council attempts to confer perpetual rights, as in Detroit Citizens Street Railway Company vs. City of Detroit; or in the case of matters that do not directly come under the police regulations as to conduct of individuals such as sanitary regulations regulating the sale of meat, which was held in the city of St. Paul vs. Laidler, 72 Am. Dec., 89, to be an ordinance in restraint of trade; and ordinances compelling the railroad companies to place watchmen and gates at each crossing, as in Pittsburg Railroad Company vs. the Town of Crownpoint, 45 N. E., 587. Thus we see that in all the cases cited by the appellant on this point, only three of them are under police regulations, one of which was a regulation beyond the incorporate limits of the town, and the other two were regulations, which it is true involved the safety and well being of citizens, in attempting to regulate the sale of meat and to have watchmen and gates placed at all crossings. We think, however, that there is a distinction as to the construction of ordinances governing purely local matters directly involving the conduct of individuals in maintaining the peace such as disorderly conduct and vagrancy in which cases the municipal authorities act as an agency of the state and in cases where municipal authorities regulate or attempt to

regulate lines of businesses which regulations are frequently imposed not for the purpose of regulation, but for the purpose of raising revenue and in making provision for the safety of individuals at railroad crossings, which although unreasonable in its application to one or two streets will not be entirely held void on such account, the remedy being to resist its enforcement on such streets, *State vs. Jersey City*, 47 *N. J. L.*, 286, 289.

We respectfully submit that the rule as to the reasonableness of an ordinance is as previously stated and that the decision of the lower court should be affirmed.

Respectfully,

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SIMON HELLENTHAL,
Attorneys for Appellee.